

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Personal Communications Industry Association's)
Broadband Personal Communications Services)
Alliance's Petition for Forbearance For Broadband)
Personal Communications Services)
)
Biennial Regulatory Review - Elimination)
or Streamlining of Unnecessary and Obsolete)
CMRS Regulations)
)
Forbearance from Applying Provisions of the)
Communications Act to Wireless)
Telecommunications Carriers)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT Docket No. 98-100

**REPLY OF THE BROADBAND PERSONAL COMMUNICATIONS SERVICES
ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION
TO OPPOSITIONS TO PETITION FOR RECONSIDERATION**

The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association ("PCIA") hereby submits its reply to the oppositions filed in response to PCIA's Petition for Reconsideration of the Commission's *Memorandum Opinion and Order* in the above-captioned proceeding.¹ In its Petition for Reconsideration, PCIA challenged the Commission's decision declining to forbear from enforcement of the CMRS resale rule.²

Only two parties, the Telecommunications Resellers Association ("TRA") and America One Communications, Inc. ("America One"), opposed PCIA's reconsideration request. As

¹ Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-134 (rel. July 2, 1998) ("Order").

² The Broadband Personal Communications Services Alliance of the Personal Communications Industry Association, Petition for Reconsideration, WT Docket No. 98-100 (filed Sept. 10, 1998) ("PCIA Petition").

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discussed in detail below, neither TRA nor America One offers any valid argument in response to PCIA's position that forbearance from enforcement of the CMRS resale rule is required under proper application of the three-pronged test for forbearance set forth in Section 10 of the Communications Act.³ In fact, both TRA and America One are wholly unable to describe or establish any correlation between the CMRS resale rule and the alleged benefits of resale generally. This failure lies at the heart of PCIA's reconsideration request. Because there is no evidence that the resale rule serves a justifiable purpose – yet the costs of the rule are real and substantial – it is precisely the sort of regulatory requirement appropriate for forbearance under Section 10. Accordingly, PCIA urges the Commission to grant its request for reconsideration and to forbear from enforcement of the CMRS resale rule as applied to all CMRS carriers.

I. PCIA HAS DEMONSTRATED THAT FORBEARANCE FROM ENFORCEMENT OF THE CMRS RESALE RULE IS APPROPRIATE, AND NEITHER TRA NOR AMERICA ONE HAS COUNTERED PCIA'S SHOWING

In its Petition for Reconsideration, PCIA discussed recent FCC reports indicating that the level of competition in the CMRS marketplace is substantial. For example, PCIA cited the Commission's *Third Annual CMRS Competition Report*, which indicates that there are at least three mobile telephone providers in each of the 50 largest Basic Trading Areas ("BTAs") and 97 of the 100 largest BTAs, and that, in approximately 273 BTAs, there are from three to six operating mobile service providers.⁴ As further evidence of the competitive conditions that characterize the CMRS marketplace, PCIA underscored that wireless prices have steadily been declining and that innovative, new services are constantly being introduced.⁵

³ 47 U.S.C. §§ 160(a)-(c).

⁴ *PCIA Petition* at 7 and n.23.

⁵ *Id.* at 7-8.

PCIA noted that, despite the Commission's observation in the *Order* that "the operation of market forces removes the opportunity and incentive for carriers to restrict resale in an anticompetitive manner,"⁶ the agency ignored its own findings concerning the level of competition in the CMRS marketplace and declined to forbear from enforcement of the CMRS resale rule. The Commission's failure to apply the Section 10 forbearance test in a manner consistent with the competitive nature of the CMRS marketplace and the agency's failure to accept its own findings warrant reconsideration.⁷ In addition, PCIA remains steadfast in its view that the vigorous and growing competition in the wireless marketplace mandates forbearance from the CMRS resale rule because retention of the rule is not necessary under any of the Section 10 criteria, and all of the benefits that the Commission hopes to achieve through enforcement of the rule already exist and are being amplified without the need for regulatory intervention.

Neither TRA nor America One offers any evidence that undercuts this position. Both parties devote a substantial portion of their oppositions to the argument that retention of the CMRS resale rule is necessary because the CMRS marketplace is not yet "fully competitive."⁸ It is not, however, necessary for all facilities-based wireless operators to have built out their systems in all markets in order for the FCC to exercise its Section 10 forbearance authority. The point is that the CMRS marketplace is sufficiently competitive to render continued enforcement of the CMRS resale rule unnecessary and inappropriate. In particular, as discussed in PCIA's Petition, the level of competition in the CMRS marketplace is sufficient to establish that:

(1) enforcement of the resale rule is not necessary to ensure that charges, practices, classifications

⁶ *Order*, ¶ 38.

⁷ *PCIA Petition* at 10.

⁸ Telecommunications Resellers Association, *Opposition to Petition for Reconsideration*, WT Docket No. 98-100, at 3 (filed Oct. 16, 1998) ("*TRA Opposition*"). *See also* *Opposition of* (Continued...)

or regulations are just and reasonable and are not unjustly or unreasonable discriminatory;⁹ (2) enforcement of the rule is not necessary for the protection of consumers;¹⁰ and (3) forbearance is consistent with the public interest.¹¹ Section 10 *requires* the Commission to forbear from applying any regulation or provision of the Act if these three prongs have been satisfied.

In its opposition, America One suggests that, because of the financial difficulties faced by various C block licensees and the fact that certain A and B block licensees are affiliated with incumbent local exchange carriers, the Commission should “give no weight to PCIA’s allegations of competition based on the role played by PCS carriers.”¹² This is absolutely ludicrous. The Commission has already found, based on the existing level of PCS system build-out, that PCS operators are a significant competitive force in the CMRS industry.¹³ This finding was not conditioned on the speed of C block build-out. Similarly, there is absolutely no evidence to support the claim that A and B block licensees affiliated with incumbent local exchange carriers have an incentive to discriminate against resellers¹⁴ so as to render these operations a nullity under a Section 10 analysis.

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America One Communications, Inc., WT Docket No. 98-100, at 4-5 (filed Oct. 15, 1998) (“*America One Opposition*”).

⁹ See *PCIA Petition* at 12-13.

¹⁰ *Id.* at 14-15.

¹¹ *Id.* at 15-16.

¹² *America One Opposition* at 5-6.

¹³ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, at 64 (rel. June 11, 1998).

¹⁴ In fact, special safeguards apply to ILEC provision of in-region broadband CMRS services. See generally *Amendment of the Commission’s Rules To Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, Implementation of Section 601(d) of the Telecommunications Act of 1996*, 12 FCC Rcd 15668 (1997), *petitions for recon. and petitions for review pending*. There are no special requirements governing the resale activities of broadband PCS operators affiliated with an ILEC and, to PCIA’s knowledge, no allegations of discriminatory behavior on the part of such operators have ever been raised.

TRA's contention that PCIA "completely ignores the record evidence in this docket that resellers are frequently denied the ability to resell the offerings of PCS and SMR providers"¹⁵ is equally specious. As pointed out in PCIA's Petition for Reconsideration, the arguments of every commenter that claimed to have been denied or discouraged from reselling the services of a CMRS carrier have been refuted.¹⁶ TRA distorts the marketplace by focusing only on PCS and SMR resale, and ignoring the fact that cellular providers also must be considered in the Section 10 analysis.¹⁷

Once again, TRA's best evidence of alleged discrimination comes from the surveys conducted by NWRA and TRA. These surveys are, however, indicative of nothing. TRA refuses to let go of its claim that something can be gleaned from the fact that, in response to that portion of its survey asking respondents why they are not reselling PCS services, certain respondents checked a box stating, "PCS carrier said it did not offer a resale agreement." As pointed out repeatedly by PCIA, however, not offering a resale agreement is a wholly different matter from refusing a request for resale. There are a number of legitimate reasons why a PCS carrier may not have an agreement specifically tailored to resale on hand, including that the PCS system may not be up and running or that the PCS operator offered its existing comparable business-to-business rate as opposed to a standard resale agreement. Moreover, the Commission has made plain that carriers are not obligated "to structure their offerings in any particular way, such as to promote resale, or adopt wholesale/retail business structures, or to establish a margin

¹⁵ *TRA Opposition* at 3-4.

¹⁶ *See PCIA Petition* at 13-14.

¹⁷ Notwithstanding TRA's statements about the lack of PCS and SMR resellers in the Washington, D.C., area, America One is a Washington, D.C., cellular reseller. *See* America One Communications home page, <<http://america.1.com/index.html>>(visited Oct. 23, 1998). Thus, resale in this area is not as sparse as TRA attempts to suggest.

for resellers, or guarantee resellers a profit.”¹⁸ Contrary to TRA’s claims, carriers are also under no obligation to have a resale agreement on hand or to offer such an agreement when approached by a reseller.

Both TRA and America One seek, through the CMRS resale rule, to obtain an unfair and unwarranted competitive advantage over other operators, including facilities-based competitors. In particular, TRA and America One, as well as other resellers, have misconstrued the CMRS resale rule as meaning that facilities-based carriers are obligated to offer service at wholesale rates or otherwise to structure their offerings precisely as a reseller requests. The Commission has expressly indicated that this is not what the rule requires. Moreover, because facilities-based carriers have no guarantee of success themselves, they cannot be obligated to offer packages that ensure the success of resale operators.

II. NOTWITHSTANDING THE CLAIMS OF TRA AND AMERICA ONE, THE RECORD CONTINUES TO LACK ANY SUBSTANTIVE DOCUMENTATION OF THE ALLEGED BENEFITS OF A MANDATORY FEDERAL RESALE REQUIREMENT

Although the Commission’s *Order* and the oppositions filed by TRA and America One cite several alleged benefits brought to the marketplace by resellers, neither the *Order* nor the oppositions documents any of these claimed benefits. As a result, both opponents miss the point of PCIA’s forbearance petition and its request for reconsideration, which is that there is simply no correlation between the CMRS resale rule and claimed benefits of resale in the wireless marketplace.

Furthermore, in its analysis of Section 10, the *Order* identifies alleged benefits of resale without providing any documentation or verification that these benefits in fact exist.¹⁹ Both TRA

¹⁸ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio
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and America One merely mimic the *Order*'s statements without offering any factual support for their conclusory statements and without explaining any connection between the mandatory resale rule and the benefits described. This failure clearly calls into question the validity of the Commission's decision declining to forbear from continued enforcement of the CMRS resale rule.

III. THE COMMISSION, TRA, AND AMERICA ONE HAVE ALL IGNORED THE COSTS OF NOT FORBEARING FROM ENFORCEMENT OF THE RESALE RULE

In discussing the third prong of the Section 10 test, the Commission, TRA, and America One ignore substantial evidence in the record documenting the costs of continued enforcement of the CMRS resale rule. Because many resellers misunderstand or misconstrue the rule, facilities-based operators have faced increased legal and compliance costs and have held back from offering innovative pricing schemes. These costs, as well as numerous others,²⁰ are of necessity passed on to consumers. When one considers that no correlation has ever been drawn between any benefit to consumers and the CMRS resale rule, the assertion that retention of the resale rule serves the public interest simply cannot stand.

IV. PCIA'S PROPOSAL FOR MARKET-BY-MARKET FORBEARANCE FROM THE MANDATORY RESALE OBLIGATION IS FULLY CONSISTENT WITH SECTION 10

As discussed in PCIA's Petition, the record supports forbearance from the CMRS resale rule, as applied to all CMRS providers, on a nationwide basis. As an alternative, PCIA proposed that the Commission adopt an objective, readily discernible test for market-by-market

(...Continued)

Services, 11 FCC Rcd 18455, 18462 (1996), recon. pending.

¹⁹ See *PCIA Petition* at 18-19.

²⁰ See *id.* at 16 and n.52.

forbearance — the Commission would determine under Section 10 that when four CMRS licensees become operational in a BTA, as specified in a notice filed with the agency, forbearance from the mandatory resale requirement would become effective in that BTA.

TRA and America One claim that granting forbearance on this basis is inconsistent with Section 10.²¹ These parties in effect suggest that, for market-by-market determinations, Section 10 requires the Commission to examine details of each individual market before it may grant any forbearance. Section 10, however, imposes no such requirement.

Under the procedure suggested by PCIA, the Commission would make the “determination” required by Section 10 on a blanket basis. Based on the record before it and notwithstanding the claims of TRA and America One, the Commission can determine that where four CMRS carriers are operating in a BTA, there is in every case sufficient competition such that enforcement of the mandatory resale requirement is not necessary “to ensure that the charges, practices, classifications or regulations by, for, or in connection with [CMRS] are just and reasonable and are not unjustly or unreasonably discriminatory”²² or “for the protection of consumers,”²³ and that forbearance is consistent with the public interest.²⁴ This determination, made on a nationwide basis but applied on a BTA-by-BTA basis, is fully consistent with the statutory test, and TRA and America One have provided no supportable demonstration to conclude otherwise.

²¹ *TRA Opposition* at 14; *America One Opposition* at 11-13.

²² 47 U.S.C. § 160(a)(1).

²³ *Id.*, § 160(a)(2).

²⁴ *Id.*, § 160(a)(3).

V. PCIA AGREES THAT THE COMMISSION IS ENTITLED TO INTERPRET AND EXPLAIN THE STATUTORY TEST BUT THE STANDARDS ENUNCIATED BY THE COMMISSION ARE TOO VAGUE

America One challenges PCIA's demonstration²⁵ that the Commission's explanation of its interpretation of the Section 10 forbearance test contains elements that are impermissibly vague under the Administrative Procedure Act ("APA").²⁶ America One recognizes that the Court of Appeals for the District of Columbia Circuit requires the Commission to "articulate identifiable standards" to govern its decisions.²⁷ Yet, as PCIA discussed in its Petition, elements of the standards articulated in the *Order* can in no way be considered "identifiable." For example, interested parties cannot discern what the Commission means by "immediate prospects for future development of additional facilities-based competition."²⁸ Likewise, the concept of "the value of service to previously unserved or underserved markets"²⁹ is completely undefined. The "other factors" to be considered by the Commission are unknown. America One makes no attempt to argue that these factors meet APA standards, most likely because it has no clue what the Commission intends for these standards to mean.

²⁵ *PCIA Petition* at 21-22.

²⁶ *America One Opposition* at 10-11.

²⁷ *America One Opposition* at 10, citing, *inter alia*, *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988).

²⁸ *Order*, ¶ 44.

²⁹ *Id.*

VI. CONCLUSION

As PCIA has demonstrated in its Petition and this reply, the Commission erred in declining to grant PCIA's request for forbearance from the mandatory resale rule as applied to all CMRS operators. The Commission should act immediately to reconsider its *Order*, properly apply the standards of Section 10, and grant the requested nationwide forbearance from CMRS resale requirements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of October, 1998, I caused copies of the foregoing Reply of the Broadband Personal Communications Services Alliance of the Personal Communications Industry Association to Oppositions to Petition For Reconsideration to be mailed via first-class postage prepaid mail to the following:

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